DOCKET

PROCEEDINGS AND ORDERS DATE: 101884

CASE NBR 84-1-05303 CSH CASE STATUS: DECIDED
SHORT TITLE Waye, Alton DOCKETED: Jul 26 1984
VERSUS Morris, Supt.

*** CAPITAL CASE -- No date of execution set ***

Entry	Date	Note	Proceedings and Orders
1	Jul 26 1984	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Aug 27 1984		Brief of respondent Edward C.Morris, Supt. in opposition filed.
4	Aug 30 1984		DISTRIBUTED. September 24, 1984
6	Oct 1 1984		REDISTRIBUTED. October 5, 1984
8	Oct 9 1984		The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153,227 (1976), I would grant certiorari and vacate the death sentence in this case. Dissenting opinion by Justice Marshall. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

84-5303

Supreme Court, U.S.
FILED
JUL 26 1984
Alexander L. Stevas, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ALTON WAYE,

Petitioner,

v.

EDWARD C. MORRIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Counsel for Petitioner
J. Lloyd Snook, III
Paxson, Smith, Gilliam & Scott, P.C.
418 E. Water Street
P.O. Box 2737
Charlottesville, Virginia 22902
(804) 296-2161

ORIGINAL

QUESTIONS PRESENTED

1. Was the representation afforded Petitioner by trial counsel within the range of competence demanded of attorneys in criminal cases, as required by the Sixth and Fourteenth Amendments to the United States Constitution?

2. Should this Court vacate the order of the Virginia Supreme Court of April 27. 1984, and remand to that Court for further proceedings in light of Strickland v. Washington, ___ U.S. ___ 80 L. Ed. 2d 674 (1984), and Reed v. Ross, ___ U.S. ___, 52 U.S. L. W. 4905 (June 27, 1984)?

3. Should this Court defer consideration of this case until it has decided Francis v. Franklin, cert. granted ___ U.S. ___, 52 U.S.L.W. 3869 (June 5, 1984)?

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JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3), in that Petitioner claims that his conviction violated the Sixth and Fourteenth Amendments of the United States Constitution. The order of which review is sought is the order denying Petitioner's Petition for Appeal in the Virginia Supreme Court, dated April 27, 1984.

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved in this Petition for Writ of Certiorari are the following:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. CONST. AMEND. VI.

> All persons born or naturalized in the United States . . . are citizens of the United States of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

U.S. CONST. AMEND. XIV.

STATUTES INVOLVED

The statutory provisions involved here include Va. Code Ann. Sections 18.2-31(e) and 19.2-264.4 (Cum. Supp. 1977).

Section 18.2-31 reads as follows:

> The following offenses shall constitute capital murder, punishable as a Class I felony:
>
> . . .
>
> (e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to rape;

Va. Code Ann. Sec. 19.2-264.4 reads as follows:

> A. Upon a finding that the Defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the Defendant shall be sentenced to death or life imprisonment . . .

B. . . . Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the Defendant, and any other fact in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: . . .

(ii) the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance or ...

(iv) at the time of the commission of the capital felony, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or what his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

STATEMENT OF THE CASE

Alton Waye was convicted and sentenced to die for the rape and murder of a woman in Lunenburg County. The offense occurred on October 14, 1977. The Commonwealth's evidence at trial showed that Petitioner Waye had consumed a number of beers that evening. With a friend in his car, he drove into the victim's yard and got out of his car, apparently with the intention of asking the victim whether he could use her telephone. When he returned to the car, he told his companion that he had "killed the lady." Petitioner then drove home, telephoned the sheriff, and reported that he "had killed somebody." Petitioner accompanied sheriff's deputies to the victim's house, where he showed them the body. At the sheriff's office he stated that the victim, clad in a nightgown, admitted him to use her telephone. She accompanied him to her bedroom, where they engaged in sexual intercourse, following which he

attacked the victim. He then stabbed the victim many times with a kitchen knife.

Petitioner was represented at trial by William L. Wellons, of Victoria, Virginia. After a three-day trial, Alton Waye was convicted of capital murder on April 7, 1984; in the sentencing hearing that followed on April 8, 1984, Alton Waye was sentenced to death on April 8, 1978.

During the guilt phase of the trial, Petitioner's defense was that he had not premeditated - that he lacked the requisite mens rea. The jury was given Instruction No. 7:

> The Court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequences [sic] of his act.

There was no objection to Instruction No. 7; Mr. Wellons testified at the plenary hearing on habeas corpus that he simply did not think to make the objection.

Petitioner was sentenced to death, and his appeal was upheld by the Virginia Supreme Court, Waye v. Commonwealth, 219 Va. 683, 251 S.E. 2d 202, cert. denied, 442 U.S. 924 (1979). Petitioner then filed his Petition for Writ of Habeas Corpus in the Circuit Court for the County of Mecklenburg. After two hearings and the admission of certain stipulations, the Honorable George M. Abbitt, Jr., Substitute Judge, issued his Findings of Fact and Conclusions of Law, concluding that Petitioner's claims of ineffective assistance of counsel were meritless. An appeal was taken to the Virginia Supreme Court, which denied the Petition for Appeal by order dated April 27, 1984.

ARGUMENT

Introduction

The questions presented in this case address an issue that has come to this Court repeatedly in recent years -- how to handle appeals from verdicts rendered in trials at which jury instructions that ease or shift the prosecution's burden of proof, including an instruction that "a man is presumed to intend the consequences of his acts." This instruction was clearly struck down by this Court in Sandstrom v. Montana, 442 U.S. 510 (1979). In 1982, this Court held, in Engle v. Isaac, 456 U.S. 107 (1982), that the failure of the defendant to object to a burden-shifting instruction during his trial in 1974 or 1975 could not now be noticed on habeas corpus under what has sometimes been referred to as the "futility doctrine."

Also in 1982, this Court denied certiorari in Coppola v. Warden, 222 Va. 369, 282 S.E. 2d (1981), cert. denied, 455 U.S. 927 (1982). In Coppola, the Virginia Supreme Court had denied habeas corpus relief to a petitioner whose trial in 1978 and whose appeal in 1979 did not include an objection to an instruction identical to the instruction in this case. The Virginia Supreme Court rejected Coppola's suggestion that counsel was under no duty to anticipate at trial that Sandstrom would subsequently be decided and thus had no reason to make a contemporaneous objection to Instruction 9." 222 Va. at 372. The Virginia Supreme Court ruled that the objection should have been anticipated because of In re Winship, 397 U.S. 348 (1970), and Mullaney v. Wilbur, 421 U.S. 684 (1975). This Court rejected Coppola's Petition for Writ of Certiorari from that decision of the Virginia Supreme Court, and Coppola, after waiving his right to pursue federal habeas corpus relief, was executed on August 10, 1982.

In Connecticut v. Johnson, ___ U.S. ___, 74 L. Ed. 2d 823 (1983), a plurality of this Court concluded that error under Sandstrom can never be harmless error. Joined by Justice

Stevens, concurring in the judgment, Lindsay Johnson's conviction was reversed, 5-4.

It appears that this issue will be finally resolved by this Court in the next term; see Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1984), cert. granted sub nom. Francis v. Franklin, __ U.S. ___, 52 U.S. L. W. 3869 (June 5, 1984).

Finally, in Reed v. Ross, __ U.S. ___, 52 U.S. L. W. 4905 (June 26, 1984), this Court ruled that counsel in a 1969 trial were not required to anticipate Mullaney v. Wilbur; Daniel Ross was therefore given the benefit of this Court's retroactivity ruling in Hankerson v. North Carolina, 432 U.S. 233 (1977).

In these decisions, this Court has filled in most, but not all, of a mosaic of decisions concerning the circumstances in which Mullaney v. Wilbur and Sandstrom v. Montana may be applied retroactively. The one issue that this Court has not addressed is the question of whether, and under what circumstances, counsel who failed to object to an improper jury instruction might be deemed to have rendered ineffective assistance of counsel. Such ineffectiveness could rise to the level of an independent Sixth Amendment violation or could merely constitute cause under Wainwright v. Sykes, 433 U.S. 72 (1977).

ARGUMENT I

TRIAL COUNSEL'S FAILURE TO OBJECT TO INSTRUCTION NO. 7 AT THE GUILT PHASE OF THE TRIAL DENIED PETITIONER THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Instruction No. 7, given to the jury on April 7, 1978, at the guilt phase of Petitioner's trial, read as follows:

> The court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequences [sic] of his act.

This instruction is essentially the same as the instruction ruled unconstitutional in Sandstrom v. Montana, 442 U.S. 510 (1979) (decided June 18, 1979):

> The law presumes that a person intends the ordinary consequences of his voluntary acts.

Sandstrom was based on the line of cases beginning with In re Winship, 397 U.S. 358 (1970), and continuing in Mullaney v. Wilbur, 421 U.S. 684 (1975) and United States v. United States Gypsum Company, 438 U.S. 422 (1978) (decided June 29, 1978). In United States Gypsum, this Court overturned an instruction that read as follows:

> The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.

Id. at 430. The Court also relied on, and reaffirmed, Morrissette v. United States, 342 U.S. 246 (1952).

The instruction given in Sandstrom was suspect under either of two theories. Either the instruction could be interpreted as a burden-shifting presumption like the instruction given in Mullaney, or it might be interpreted as a conclusive presumption like the instructions struck down in Morrissette and United States Gypsum Company. This Court made it quite clear that the holding in Sandstrom was merely an extension of those two well-settled lines of cases, and that, under either interpretation, the defendant was deprived of his right to the due process of law.

Instruction No. 7, given at Petitioner's trial, is virtually identical to the instruction that was disapproved in Sandstrom v. Montana. To give the instruction, therefore, is reversible error. To fail to object to the instruction is to render ineffective assistance of counsel.

Given that the instruction is unconstitutional, and that giving it would be reversible error, the question under

Sixth Amendment analysis is then whether counsel's conduct in failing to object to that instruction was conduct "outside the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970).

In trying to determine what the reasonably competent counsel knew or should have known, it is instructive first to look to decisions of this Court and the Virginia Supreme Court.

In Coppola v. Warden, 222 Va. 369, 282 S.E.2d (1981), cert. denied, 455 U.S. 927 (1982), the Virginia Supreme Court and, ultimately, this Court, refused to consider Coppola's claim that an instruction that "a man is taken to intend that which he does or which is the natural and necessary consequence of his own act" violated due process. The issue was whether the failure to make a contemporaneous objection to the giving of the instruction would bar relief. The Virginia Supreme Court summarized Coppola's claim, and responded, as follows:

> Coppola's counsel argued before us that he was under no duty to anticipate at trial that Sandstrom would subsequently be decided and thus had no reason to make a contemporaneous objection to Instruction 9. Sandstrom, however, was merely a further application of the principle that the burden rests and remains on the prosecution in a criminal case to prove beyond a reasonable doubt every element of the offense, and that the burden of persuasion may not be shifted to the accused by presumptions, as earlier enunciated in In re Winship, 397 U.S. 358, 364 (1970), and Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975), both decided long before Coppola's trial. See also Hodge v. Commonwealth, 217 Va. 338, 228 S.E.2d 692 (1976). Thus, defense counsel in Sandstrom, relying upon Mullaney and other cases already decided at that time, made a timely objection to the presumption instruction.

Coppola, supra, 222 Va. at 372. The Virginia Supreme Court, in other words, felt that counsel had a duty to anticipate Sandstrom, and apparently felt that the ordinarily competent lawyer would make that objection.

In Engle v. Isaac, 456 U.S. 107 (1982), this Court considered the failure of trial counsel to make

an objection to a burden-shifting presumption. Counsel had not foreseen a later decision by the Ohio Supreme Court. The Court rejected the claim that the intervening change in law would be "cause" under Wainwright v. Sykes, 433 U.S. 72 (1977), permitting the issue to be raised in the absence of a contemporaneous objection. That question, the Court wrote,

> need not detain us here since respondents' claims were far from unknown at the time of their trials.

Engle v. Isaac, 456 U.S. at 131. One of the respondents

> even had the benefit of our opinion in Mullaney v. Wilbur, supra, decided three months before his trial. In Mullaney we invalidated a Maine practice requiring criminal defendants to negate malice by proving that they acted in the heat of passion. We thus explicitly acknowledged the link between Winship and constitutional limits on assignment of the burden of proof.

Id. at 133 n. 42.

In short, this Court held that competent counsel would make the objection.

> During the five years following [In re Winship], dozens of defendants relied upon this language to challenge the constitutionality of rules requiring them to bear a burden of proof.

Id. at 131-132; see cases cited at n.40. These dozens of defendants made the objection even though, "in most cases, the defendants' claims countered well-established principles of law." Id. at 132.

Some commentators have indicated that rebuttable presumptions have been suspect long before In re Winship was decided.

> The generally accepted rule is that once the prosecution has proved the underlying fact (or facts) to which the presumption attaches, the case must go to the jury (i.e., there will be no directed verdict for the defendant); but the jury is not compelled, even in the complete absence of rebuttal evidence by the defendant, to find the ultimate fact required for conviction (i.e., the "presumption" is a "permissive" rather than a "mandatory" one).

W. LaFave and A. Scott, Criminal Law Sec. 8 at 52 (emphasis added) (1972). The authors went on to explain the difference between a rebuttable presumption, as embodied in the instruction given in this case, and an inference:

> The word "presumption" by itself is ambiguous without the accompanying adjective, for it may mean either that the jury must, or that it may, find the presumed fact from the proved fact. So doubtless a better single word for the permissive sort of presumption is "inference." See Barfield v. United States, 229 F.2d 936, 929-40 (5th Cir. 1956) (reversing conviction for interstate transportation of stolen car knowing it to be stolen, because the trial court charged the jury that unexplained possession of recently stolen property raises "presumptions" of guilty knowledge; it was held this might have misled the jury into belief that it must, not may, find guilty knowledge; the proper word is "inference").

Id. n.54 (emphasis in original).

In addition, several commentators have noted that Winship might at least significantly clarify, if not alter, traditional burdens of proof. See, e.g., LaFave and Scott, supra, at 46-51; Foreword, "The Supreme Court 1969 Term", 84 Harv. L. Rev. 1, 159 (1970). Mullaney v. Wilbur, of course, made the issue all the more obvious to practitioners in Virginia; see Comment, "Has the Burger Court Dealt a Death Blow to the Presumption of Malice in Virginia?", 10 U.Rich.L.Rev. 687 (1976).

Recently commentators have been no more kind to the instruction given in this trial; see Jones, "Presumptions in Jury Instructions in Criminal Cases After Mullaney v. Wilbur," Va. B. Assoc. J., Winter, 1981, 17. Jones cites a number of important Virginia sources that should have signalled to Virginia attorneys in 1978 that there were serious constitutional questions concerning the instruction that was given in this case. See, e.g., Note, "Reforming the Law of Homicide," 59 Va. L. Rev. 1270 (1973); Comment, "Has the Burger Court Dealt a Death Blow to the Presumption of Malice in Virginia?", 10 U.Rich.L.Rev. 687 (1976); Friend, The Law of Evidence in Virginia Sections 89-93 (1977).

In sum, both this Court and the Virginia Supreme Court have indicated that, in the period between 1975 and 1978, competent Virginia counsel would have objected to the instruction given in this case. Furthermore, there were many Virginia sources that should have alerted practicing lawyers in Virginia to the constitutional weakness of the instruction.

Finally, the standard of care among Virginia attorneys would have been to make an objection based on Mullaney v. Wilbur. Robert T. Hall, a criminal lawyer of long experience in trial work and a frequent lecturer and instructor in criminal procedure and constitutional law who has familiarized himself with the standard of practice in Virginia, testified as an expert witness for Petitioner. Mr. Hall testified as follows:

> Q. What would a normally competent attorney in 1978 have argued to the court regarding the giving of an instruction that a man is presumed to intend the consequences of his acts?
>
> A. The attorney would have objected to that instruction. The principle cited in Mullaney against Wilbur, as well as the existence in any particular case of a psychiatric style of defense on intent, could warrant the objection to that instruction as a matter of course.
>
> Q. Now, to anticipate a question from Mr. Wells, are you saying that all normally competent attorneys in 1978 had read or were familiar with the case of Mullaney v. Wilbur necessarily?
>
> A. Yes, sir. That was one of the landmarkes of the U.S. Supreme Court in that era, and I would expect knowledgeable attorneys to have been not only familiar with it, but with Virginia state court cases that bore on that subject.

(II, 25-26). On cross-examination, Mr. Hall explained:

> While there are exceptions, as a general proposition, if the Commonwealth requests an instruction that says presumption, if that word presumption is in there, the red flag goes up and the defendant ought to be prepared to object to it. Mullaney is one of the grounds.

(II, 35). This objection should be made, and would ordinarily be made, even though the instruction might appear in books such as

Doubles and Emroch, Virginia Jury Instructions, Sec. 118.15 (1964 ed.)

Mr. Hall testified that the reasonably competent criminal defense lawyer in Virginia in 1978 would have known that the instruction given in this case was at least constitutionally suspect; although Mr. Hall did not state that every attorney would have made the objection in every case, in a case in which there was a "psychiatric style" defense concerning intent, it is mandatory that the objection be made. The commentators in the last ten years -- both before this trial was conducted and after -- have made quite clear the grounds for the objection. This Court and the Virginia Supreme Court have both indicated that competent counsel would be aware of the grounds for that objection.

Mr. Wellons did not think to make the objection. In a capital murder case such as this, there can be no justification whatsoever for not making every objection and preserving every possible appellate issue relating to the main line of defense in this case. This was not a tactical decision; it was a mistake based on ignorance or neglect, rather than on informed, professional deliberation. Mr. Wellons' conduct in this regard fell below the "range of competence demanded of attorneys in criminal cases."

This Court ruled, in Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674, 698 (1984), that, to meet the "prejudice" standard in an effective assistance of counsel inquiry,

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Where the only real issue on guilt or innocence was mens rea, a burden-shifting presumption on the issue of intent can never be harmless error.

Counsel's failure to object to Instruction 7, and to preserve the point on appeal, constituted ineffective assistance of counsel, in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

ARGUMENT II

THIS COURT SHOULD VACATE THE ORDER OF THE VIRGINIA SUPREME COURT DATED APRIL 27, 1984, AND REMAND THIS CASE TO THAT COURT FOR FURTHER PROCEEDINGS IN LIGHT OF RECENT CASE LAW.

This Court has recently decided two cases of great importance to Petitioner's claim. The first, Strickland v. Washington, __ U.S. __ 80 L. Ed. 2d 674 (1984), defines the relevant standards for ineffective assistance of counsel. Reed v. Ross, _ U.S. __, 52 U.S.L.W. 4905 (June 27, 1984), discussed at length and with specificity the question of whether the burden-shifting instructions condemned in Mullaney v. Wilbur, 421 U.S. 684 (1975) and Sandatrom v. Montana, 442 U.S. 510 (1979) were so foreseeable as to have imposed a duty upon counsel to anticipate them.

Both of these decisions have far-reaching implications for Petitioner's case, as has been discussed in Arqument I, supra.

Of course, this case is currently before the Court on a Petition for Writ of Certiorari growing out of a state habeas corpus proceeding. This is the last step at which the interests of federalism and comity so prized by this Court, see Wainwright v. Sykes, 433 U.S. 72 (1977), may be invoked. If the state courts are to be given an opportunity to construe Reed v. Ross and Strickland v. Washington and to make findings of fact and conclusions of law incorporating the doctrines newly explicated in those cases, this is the last chance. Only if this Court remands to the Virginia Supreme Court for further consideration in light of Reed v. Ross and Strickland v. Washington can the Virginia courts have a chance to make those

findings of fact to which federal courts must defer under 28 U.S.C. Sec. 2254(d).

Petitioner would happily submit his claims to the review of a Virginia court properly informed by this Court's rulings in Reed v. Ross and Strickland v. Washington, and Petitioner accordingly requests this Court to give him that opportunity, and to ask the Virginia courts to address these issues in light of new case law.

ARGUMENT III

THIS COURT SHOULD DEFER CONSIDERATION OF THIS CASE UNTIL IT HAS DECIDED FRANCIS V. FRANKLIN.

On June 5, 1984, this Court granted certiorari in Francis v. Franklin, on certiorari from Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1984). The issue in Francis v. Franklin is whether it can ever be harmless error to give the instruction condemned in Sandatrom v. Montana, 442 U.S. 510 (1979), essentially the same instruction as was given in this case. Obviously, a question of harmless error is an important part of any "cause" and "prejudice" analysis under Wainwright v. Sykes, 433 U.S. 72 (1977). If the giving of such an instruction can never be harmless error, then prejudice must be presumed under the Wainwright v. Sykes standard. The issue at that point would only be one of "cause." Similarly, under the effective assistance of counsel rationale of Strickland v. Washington, ___ U.S. __, 80 L.E.2d 674 (1984), the issue involves an analysis not only of "ineffectiveness" but also of prejudice. Again, a ruling by this Court that a giving of the instruction can never be harmless error would constitute "prejudice" per se.

The resources of this Court, federal courts in general, and the entire judicial system, both state and federal, favor a resolution of these issues at as early a level in the appellate and post-conviction process as is possible. At this juncture, that means that it is preferable for a state habeas corpus court the deal with the issue, rather than to have a federal habeas corpus court deal with the issue.

If this Court were to routinely deny the Petition for Writ of Certiorari at this juncture, the issue would then be taken into federal District Court. The federal District Court would be left to make a decision, even while knowing that this Court's ruling in Francis v. Franklin was imminent. With the expedited procedures being used in Virginia and in the Fourth Circuit, it is entirely likely that this case would make its way through federal District Court, through the Fourth Circuit Court of Appeals, and back up to this Court before a ruling in Francis v. Franklin would be had. Ultimately, there is a great chance, regardless of how this Court decides Francis v. Franklin, that a federal habeas petition would end up back on the docket of this Court in an emergency setting, with a request for a stay attached, and the need to decide the case in light of Francis v. Franklin, but without the benefit of time. If relief is not granted on any other issue in federal court, the entire federal habeas corpus process -- with appearances in three courts, extraordinary motions, requests for stays, evidentiary hearings, extensive briefs, and the like -- would be for naught; ultimately, any actions by the federal courts before this Court's ruling in Francis v. Franklin would amount to a waste of time.

Accordingly, Petitioner prays this Court to hold this case in abeyance pending this Court's decision in Francis v. Franklin. If the Court affirms the Eleventh Circuit decision that such Mullaney/Sandstrom errors are never harmless, the case could then be remanded to the Virginia Courts for further

could then be remanded to the Virginia Courts for further proceedings, and the interests of federalism and comity would be preserved. Petitioner prays this Court to hold this case, and to eventually remand it to the Virginia Supreme Court for consideration in light of Francis v. Franklin, to be decided next term.

CONCLUSION

In this Petition for Writ of Certiorari, Petitioner has prayed, in the alternative, for three different types of relief. First, Petitioner prays this Court to grant certiorari to decide the question posed in Argument I -- did the failure of counsel to object in 1978 to a Sandstrom instruction violate Petitioner's right to the effective assistance of counsel?

Second, in the alternative, Petitioner prays this Court to vacate the order of the Virginia Supreme Court dated April 27, 1984, and to remand to the Virginia courts for further proceedings in light of Strickland v. Washington, ___ U.S. ___, 80 L.E. 2d 674 (1984) and Reed v. Ross, ___ U.S. ___, 52 U.S. L.W. 4905 (June 27, 1984).

Third, in the alternative, Petitioner prays this Court to hold this Petition for Writ of Certiorari in abeyance pending this Court's decision in Francis v. Franklin, cert. granted, 52 U.S.L.W. 3968 (June 5, 1984).

ALTON WAYE

By Counsel

J. Lloyd Snook, III, Esquire
Paxson, Smith, Gilliam & Scott, P.C.
418 E. Water Street
P.O. Box 2737
Charlottesville, Virginia 22902
(804) 296-2161

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 27th *day of* April, 1984.

Alton Waye, Appellant,

against Record No. 831027
Circuit Court No. 1315-C (H.C.)

Edward C. Morris, Superintendent,
Mecklenburg Correctional Center, Appellee.

From the Circuit Court of Mecklenburg County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal. Code § 8.01-675.

The said circuit court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: _____
Deputy Clerk

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee $300.00 plus his costs and expenses
Filing fee 25.00

Teste:

Allen L. Lucy, Clerk

By: _____ -1-
Deputy Clerk

VIRGINIA

IN THE CIRCUIT COURT FOR THE COUNTY OF MECKLENBURG

ALTON WAYE,

Petitioner

v.

EDWARD C. MORRIS, Superintendent
Mecklenburg Correctional Center,

Respondent

ORDER

For the reasons stated in the Findings of Fact and Conclusions of Law attached hereto and by this reference made a part hereof, it is ORDERED that Petitioner's Petition for a Writ of Habeas Corpus be denied and dismissed.

It is further ORDERED that counsel John C. Lowe and Richard J. Bonnie, appointed to represent Petitioner by prior order of this Court, shall be paid a fee of $1000.00 for their efforts on Petitioner's behalf in this case, and that they be allowed their costs of $232.33, incurred herein.

Counsel for Petitioner having advised the Court that Petitioner intends to seek a writ of error from the Virginia Supreme Court, counsel for Petitioner John C. Lowe and Richard J. Bonnie are hereby appointed to represeht Petitioner before the Virginia Supreme Court for the purposes of appeal.

There being no execution date currently pending, it is further ORDERED that no such execution date shall be set until after the Virginia Supreme Court has disposed of the Petition for Appeal to be filed, or until ninety (90) days from the entry of this Order, if no such Petition for Appeal is filed.

-2-

And the Clerk of this Court shall certify copies of this Order and shall send the said copies to Petitioner, counsel for Petitioner and counsel for Respondent.

ENTERED this 24 day of March, 1983.

George Allitt, Jr.
Judge

I ask for this:

Linwood T. Wells, Jr.
Assistant Attorney General
Counsel for Respondent

Seen and objected to:

J. Lloyd Snook, III
Counsel for Petitioner

Law Order Book 40
Page 209

TRUE COPY, TESTE:
D. G. Patterson Clerk
Circuit Court of Mecklenburg
State of Virginia

VIRGINIA:

IN THE CIRCUIT COURT OF MECKLENBURG COUNTY

ALTON WAYE
Petitioner

v.

EDWARD C. MORRIS, Superintendent,
Mecklenburg Correctional Center
Respondent

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FINDINGS OF FACT

1. The Petitioner raised before the Supreme Court of Virginia, either directly or indirectly, the allegations contained in Paragraphs 31, 33-34, portions of 41-44, portions of 48-54, 55, 57, 76-82, of his Petition for a Writ of Habeas Corpus and these allegations were determined adversley to him.

2. The allegations contained in Paragraphs 32, 35-40, portions of 41-44, 45-47, portions of 48-54, 56, 58-59, 71-75, 83-84, and 85-89, of said Petition were not raised by Petitioner at trial, despite the existence of procedures by which to raise them, and they were not raised on appeal.

3. Counsel appointed to represent Petitioner at trial more than adequately developed evidence, from a psychiatric standpoint, on behalf of the Petitioner to be utilized both at the guilt and sentencing stage of the Petitioner's trial In view of the fact that Dr. Christian, chosen by Petitioner's counsel, was able to review records and reports previously prepared at Central State Hospital having to do with the Petitioner, one personal interview was sufficient for him to determine from the Petitioner facts which he could utilize in order to make a proper determination as to Petitioner's mental status, both at the time the crime was committed and thereafter.

Instructions A and B, given by the Trial Court are not ambiguous, and their words did not cast upon the Petitioner a burden of proof to which he should not have been subjected.

Petitioner's counsel made a more than adequate investigation surrounding jurors who might be seated at Petitioner's trial, having talked with other counsel who had had previous cases with the same jury and others in the county, and having had, based on his own experience, a "feel" for attitudes of people in the jurisdiction from which the jurors would be drawn.

Petitioner's counsel, in view of his experience and previous practice, did not need the assistance of an additional attorney in order to carry out faithfully and properly his duties.

Although Petitioner's counsel may not have advised Dr. Christian as to the exact wording of the capital murder statutes as they relate to mental illness, disturbance, or status, Petitioner's counsel did sufficiently advise Dr. Christian as to issues which could be raised relevant thereto, and Dr. Christian, having been so advised, rendered advice which was exactly the same as if he had been read the exact words of the statutory sections. The evidence did not show that additional evaluations of the Petitioner by psychiatric experts was called for.

CONCLUSIONS OF LAW

1. The Petitioner, having raised allegations referred to in Paragraph 1 herein of the Findings of Fact before the Supreme Court of Virginia, either directly or indirectly, and those allegations having been determined adversely to him in the Supreme Court, Petitioner is not entitled to relief upon them for the reasons stated by the Supreme Court of Virginia and further for the reason that the present

Petition is repetitious. Hawks v. Cox, 211 Va. 91, 175 S. E. 2d 271 (1970).

2. The allegations raised by Petitioner and referred to in Paragraph 2 herein of the Findings of Fact were not raised by Petitioner at trial, despite the existence of procedures by which to raise them and were not raised on appeal. Petitioner, therefore, is not entitled to be heard because he has failed to abide by contemporaneous objection requirements of both the Rules of the Supreme Court of Virginia and of cases decided thereunder. In addition, Petitioner is not entitled to be heard because he attempts to use habeas corpus as a substitute for an appeal and may not do so since these allegations could have been raised and adjudicated at trial and on appeal. Slayton v. Parrigan, 215 Va. 27, 205 S. E. 2d 680 (1974).

3. Petitioner was not denied the effective assistance of counsel under either the "farce and mockery" standard or the standard enunciated by the United States Court of Appeals for the Fifth Circuit in Marzullo v. Maryland, 561 F.2d 540 (1977). As a matter of law, no evidence of prejudice has been shown to have resulted any conduct or omission on the part of Petitioner's counsel. On the contrary, the record affirmatively shows that Petitioner suffered no prejudice, and, therefore, even if the burden were upon the Respondent to show affirmatively that Petitioner was not prejudiced, that burden has been carried.

The nature of the ineffective assistance of counsel is no different from that in other cases although totality of the circumstances must be taken in to consideration in both types of cases. Were the standard higher in capital cases, however, Petitioner's counsel, considering that he represented a defendant charged with capital murder and considering all of the other circumstances surrounding the

preparation and trial of the case, rendered the client the effective assistance of counsel.

As a matter of law, the evidence was sufficient to prove that the murder occurred during or dubsequent to the commission of the rape and to show premeditation on the part of the Petitioner. Petitioner's counsel, therefore, did not deny his client the effective assistance of counsel in not moving to strike the evidence as being insufficient on these two counts.

Instructions given at Petitioner's trial were both adequate and appropriate and, therefore, Petitioner's counsel was not ineffective in failing to ask for instructions which Petitioner now claims should have been requested.

Entered this ___ day of _____, 1983

_____
Judge
Retired - Recalled

I ask for this:

_____
Counsel for Respondent

Seen and objected to:

_____
Counsel for Petitioner

RESPONDENT'S

BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
AUG 27 1984
ALEXANDER L. STEVAS
CLERK

84.5303

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Record No. _____

ALTON WAYE,

Petitioner,

v.

EDWARD C. MORRIS,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

GERALD L. BALILES
Attorney General of Virginia

LINWOOD T. WELLS, JR.
Assistant Attorney General

101 North 8th Street
Richmond, Virginia 23219
(804) 786-6563

RECEIVED
AUG 27 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

I. DID DEFENSE COUNSEL'S NOT HAVING OBJECTED TO INSTRUCTION NO. 7 DENY PETITIONER THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS?

II. SHOULD THIS CASE BE REMANDED FOR FURTHER PROCEEDINGS?

III. NEED CONSIDERATION BE DEFERRED UNTIL FRANCIS V. FRANKLIN IS DECIDED?

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JURISDICTION

Petitioner asserts jurisdiction in this case to be pursuant to the provisions of 28 U.S.C. § 1257(3). He seeks review of an Order of the Supreme Court of Virginia of April 27, 1984, wherein the Court denied Petitioner's Petition for Appeal. This decision is not reported.

ARGUMENT

I. DEFENSE COUNSEL'S NOT HAVING OBJECTED TO INSTRUCTION NO. 7 DID NOT DENY PETITIONER THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

Petitioner asserts that his counsel's not having objected to an instruction given during the guilt stage of his capital murder trial denied him the effective assistance of counsel. During the trial, which took place in the early part of 1978, the jury was instructed as follows:

> The Court instructs the jury that a man is presumed to intend that which he does or which is the immediate or necessary consequences [sic] of his act.

The instruction is essentially the same as that one which was subseqsuently struck down by this Court, but not until 1979, in Sandstrom v. Montana, 442 U.S. 510 (1979).

Petitioner correctly points out that Sandstrom, though decided after trial of his case, was decided after Mullaney v. Wilbur, 421 U.S. 684 (1975), which was proceeded by a decision of this Court of 1970 of In re Winship, 397 U.S. 348 (1970), and asserts that Mullaney and Winship provided a basis upon which to construct an objection to the instruction.

The argument which Petitioner makes is defeated by a case already decided by this Court, Engle v. Isaac, 456 U.S. 107 (1982). There, counsel had failed to object to an instruction requiring criminal defendants to carry the burden of proving self-defense by a preponderance of the evidence. When petitioners complained of the instruction for the first time in the District Court, however, they were confronted with the requirement of Wainwright v. Sykes, 433 U.S. 72 (1977), that both "cause" and "prejudice" be demonstrated before the issue could be considered by that Court. Petitioners then asserted that novelty of the claim was a basis sufficient to satisfy the "cause" prong. This Court, however, rejected that assertion, noting that the claim was "far from unknown at the time of their trials" and added it could not conclude that the defendants "lacked the tools to construct their constitutional claim." 456 U.S. at 131, 133. This Court then stated:

> We do not suggest that every astute counsel would have relied upon Winship to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.

Id. at 133-134. (emphasis supplied).

This Court's language in Engle effectively decides Petitioner's claim. The mere existence of tools with which to construct a claim does not provide a basis upon which to conclude that counsel's failure to construct that claim constitutes a denial of the effective assistance of counsel. It is this very argument that Petitioner makes, and it is this very assertion that this Court rejected in Engle.

Winship and Mullaney both dealt with burden-shifting instructions, and to that extent they did, in fact, provide some, though not necessarily a clear, basis for making an objection. However, Petitioner here converts that a "could-have-been" argument into a "should-have-been one."[1] As will be hereinafter indicated in Argument II, the test for the ineffective assistance of counsel does not rest upon a bed of "could-have-beens."

Petitioner cites testimony given at his State habeas corpus hearing in which a witness asserted that a normally competent attorney would have objected to a Sandstrom-like instruction in 1978. Yet the record also shows that the instruction was one which had been in existence in the Commonwealth of Virginia for over 100 years and one which had been recommended in several works consistently utilized by Virginia attorneys. Testimony by the witness, in any event, was incredible in light of what we all

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[1]Petitioner asserts that the Supreme Court of Virginia in Coppola v. Warden, 222 Va. 369, 282 S.E.2d 10 (1981), cert. denied, 455 U.S. 927 (1982), "felt" that counsel had a duty to object to an instruction similar to one later held to be unconstitutional in Sandstrom. A review of the decision, however, merely indicates that the Court concluded that the claim could have been made, and the Court made no judgment upon counsel's performance for failing to make the objection.

know. After Mullaney, it was not a common practice for attorneys to raise an objection to Sandstrom-like instructions. If there had been such a practice, there would literally have been thousands of cases reported in which the issue was presented.

Petitioner's assertion that he was denied the effective assistance of counsel is demolished by this Court's decision in Engle. Even if that were not the case, however, his assertion cannot stand in light of a recent case decided by this Court, discussed in the next Argument.

II. THIS CASE SHOULD NOT BE REMANDED FOR FURTHER PROCEEDINGS.

In the recently decided case of Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674 (1984), this Court enunciated the standard to be applied in making determinations with respect to the alleged ineffective assistance of counsel. Subsequently, in Reed v. Ross, ___ U.S. ___, 52 U.S.L.W. 4905, decided June 27, 1984, this Court held that the "cause" prong of Wainwright was satisfied in cases in which counsel failed to object to an instruction where the objection was based upon a novel issue.

Petitioner asserts that his case should be remanded to the Supreme Court of Virginia for further consideratrion in light of Reed and Strickland.

Petitioner's position is untenable. In the first place, the Circuit Court which conducted the State plenary hearing upon the issue of alleged ineffective assistance of counsel applied, not only the test then utilized by the Commonwealth of Virginia to determine the effective assistance of counsel,[2] but also the test then utilized by the United States Court of Appeals for the Fourth Circuit enunciated in Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977). While the test in Marzullo--that of whether counsel acted within the range of competence demanded of attorneys in criminal cases--varied from that enunciated by this Court in Strickland--that of whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial could not be relied on as having produced a just result, the tests are essentially the same in light of this Court's statement in Strickland that a defendant must show that counsel's representation falls below an objective standard of reasonableness. This Court specifically noted in Strickland that different tests had been utilized previously in the Circuits, and, after doing so, held it not to be necessary to redetermine issues of effective assistance of counsel using the new standard.

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[2] See, Peyton v. Fields, 207 Va. 40, 147 S.E.2d 162 (1966); Slayton v. Weinberger, 213 Va. 690, 194 S.E.2d 703 (1973).

In Reed, where there had existed at the time of defendant's trial scant authority to form a basis upon which to raise an objection to a burden-shifting instruction, this Court held that novelty of the issue was a sufficient excuse for having failed to raise it at trial and that, therefore, the "cause" factor in Wainwright was satisfied.

Neither Strickland nor Reed have any impact upon the petitioner's case, Strickland because it has essentially already been applied, and Reed because it is inapposite to this case.

Moreover, even if it were necessary to apply Strickland to Petitioner's case, what this Court there held with respect to proof of prejudice cannot be disregarded. Said this Court:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermind confidence in the outcome.

80 L.Ed.2d at 698. (emphasis supplied).

In the face of the evidence--multiple stab wounds over the victim's neck, the front of the chest, the back of the chest, the abdomen, the area around the pelvis, the forearm and the fingers--one can only wonder why Petitioner asserts that there is a reasonable probability that, but for an objection on the part of his counsel, which, incidentally, of course, would have had to have been successful,[3] the results of Petitioner's trial would have been different.

Moreover, nothing in either of these opinions takes away from what this Court held in Henderson v. Kibbe, 431 U.S. 145 (1977), as follows:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state's court judgment is even greater than the showing required to establish plain error on direct appeal.

431 U.S. at 154.

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[3]One wonders if, whether as a matter of competency of counsel, it was necessary to raise such an issue, it would also have been, as a matter of "competency" of the courts, necessary to sustain the objection.

Henderson was given full support by this Court at the same time it had decided Engle. See United States v. Frady, 466 U.S. 152 (1982).

The present case need not be remanded for further proceedings. Neither Strickland nor Reed requires redetermination of any issue presented by the Petitioner. He has not demonstrated the ineffective assistance of counsel, and he has not demonstrated that he has suffered prejudice sufficient to obtain relief.

III. CONSIDERATION NEED NOT BE DEFERRED UNTIL FRANCIS V. FRANKLIN IS DECIDED.

Petitioner urges that this Court should defer consideration of his case until it has decided Francis v. Franklin, 720 F.2d 1206 (11th Cir. 1984), in which this Court has granted certiorari. Other than for purposes of delay in this capital case, it is difficult to understand why petitioner's case should await a decision in Francis.

In Francis, the Court of Appeals held that the State trial court had erred in granting an instruction shifting the burden of proof to the defendant on the issue of intent, malice, and accident, in violation of Sandstrom. The Court went on to hold that the error was not harmless. However, the defendant's only defense was that he did not have the reckless intent to kill, and the facts, in the words of the Court, did not "overwhelmingly preclude that defense." There was, therefore, a substantial question with respect to the intent of the defendant. In the instant case, there is not.

CONCLUSION

For the reasons set forth, Respondent asserts that the decision of the Supreme Court of Virginia was correct and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GERALD L. BALILES
Attorney General of Virginia

LINWOOD T. WELLS, JR.
Assistant Attorney General

101 North 8th Street
Richmond, Virginia 23219
(804) 786-6563

CERTIFICATE OF SERVICE

I, Linwood T. Wells, Jr., a member of the bar of this Court, do certify that on August 23, 1984, I caused this Brief in Opposition to be deposited in a United States Post Office or Mailbox, first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2.

I further certify that a copy of this Brief in Opposition was mailed, first class postage prepaid to J. Lloyd Snook, III, Esquire, Paxson, Smith, Gilliam & Scott, P.C., 418 E. Water Street, P. O. Box 2737, Charlottesville, Virginia 22902, Counsel for Petitioner.

Linwood T. Wells, Jr.
Assistant Attorney General

OPINION

SUPREME COURT OF THE UNITED STATES

ALTON WAYE *v.* EDWARD C. MORRIS, SUPERINTENDENT, MECKLENBURG CORRECTIONAL CENTER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 84-5303. Decided October 9, 1984

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting from denial of certiorari.

I

In state habeas corpus proceedings, petitioner argued that he was denied effective assistance of trial counsel as evidenced by that counsel's failure to object to an instruction that was inconsistent with the decision this Court announced, one year after petitioner's trial, in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Petitioner's sole defense at his capital trial for murder was lack of premeditation. The evidence at trial showed that petitioner had consumed a number of beers on the evening of the crime and that, immediately after killing the victim, he telephoned police to report that he "had killed somebody." Petitioner accompanied sheriff's deputies to the victim's house, where he showed them the body. Petitioner was convicted of capital murder on April 7, 1978, and sentenced to death.

The instruction at issue, evidently taken from the Virginia form book of jury instructions, was as follows:

> The Court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequences [sic] of his act.

As the State now concedes, there is no doubt that this instruction violates the Constitution, for in *Sandstrom* we held that a virtually identical instruction violated due process and the principles against burden shifting we had set forth in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), and *Patterson* v. *New York*, 432 U. S. 197 (1977). *Sandstrom*, however, was decided by this Court on June 18, 1979, a little over a year after petitioner's trial. The question presented by this petition is thus whether the failure of petitioner's counsel, in a capital case in which premeditation was the only issue, to make the very same objection that Sandstrom's trial counsel had made several years earlier indicates that petitioner was denied his Sixth Amendment right to effective counsel.

This question presents the Court with an important opportunity to give content to the generalized standards for constitutionally effective counsel announced last Term in *Strickland* v. *Washington*, 52 U. S. L. W. 4565 (U. S. May 14, 1984). With respect to the prejudice prong of *Strickland*, the fact that the Court has already seen fit to grant a petition for certiorari on the question whether *Sandstrom* error can ever be harmless indicates that the prejudice issue is worthy of the Court's attention. *Francis* v. *Franklin*, No.83–1590, *cert. granted*, 52 U. S. L. W. (June 5, 1984);[1] see also *Connecticut* v. *Johnson*, —— U. S. —— (19) (four-justice plurality holding that *Sandstrom* error is never harmless). And with respect to the ineffectiveness component of *Strickland*—the requirement that counsel's performance not fall below the "range of competence demanded of attorneys in criminal cases," *Strickland*,

[1] To the extent there is any question as to whether petitioner was prejudiced by the defective instruction, the petition ought at least to be held for our decision in *Francis*, in which we will address the effect of *Sandstrom* error.

52 U. S. L. W., at 4570—petitioner has marshalled a strong case.

Petitioner's trial took place in April 1979. Nearly two years earlier, in Deer Lodge County, Montana, David Sandstrom's counsel had realized that decisions from this Court made it virtually certain that the instruction used at petitioner's trial was inconsistent with the Constitution, a contention with which we eventually and unanimously agreed. Our decision in *Sandstrom*, we stated, was a logical outgrowth of *Mullaney* v. *Wilbur*, *supra*—in which the Court invalidated an instruction that malice was to be implied unless the defendant rebutted this presumption—and *Patterson* v. *New York*, *supra* at 215 —in which we reaffirmed that "a state must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant" by means of any presumption. Both of these decisions, of course, were available to petitioner's counsel at the time of trial.

Mullaney, in particular, should have put petitioner's counsel on notice to make the objection. As petitioner informed the state habeas court, in the wake of *Mullaney* a spate of Virginia publications, including ones oriented to practitioners, had suggested that the Virgina instruction on implied malice used at petitioner's trial was constitutionally defective. See, *e. g.*, Comment, Has the Burger Court Dealt a Death Blow to the Presumption of Malice in Virginia, 10 U. Rich. L. Rev. 687 (1976); Friend, The Law of Evidence in Virginia, Sections 89–93 (1977); see also Note, Reforming the Law of Homicide, 59 Va. L. Rev. 1270 (1973). In addition, a criminal lawyer of long experience in Virginia testified in petitioner's state habeas proceedings that, after *Mullaney* and as of 1978, every competent attorney in a Virginia case in which premeditation was at issue would have viewed it as mandatory to object to the burden-shifting instruction. As the attorney said, "if the Commonwealth requests an instruction that says presumption, if that word presumption is in

there, the red flag goes up and the defendant ought to be prepared to object to it. *Mullaney* is one of the grounds." Pet. for Cert. 10.

This is therefore not a case in which "defense counsel [failed to] recognize and raise every conceivable constitutional claim." *Engle* v. *Isaac*, 456 U. S. 107, —— (1982). Nor is it a case in which either "the defendant's own statements or actions" or an arguably "tactical decision" of counsel can even plausibly justify the failings of petitioner's counsel. Instead, trial counsel in a capital case "simply did not think"[2] to make an objection that every competent attorney in Virginia allegedly would have made and that David Sandstrom's counsel had thought to make a full two years earlier.

The way in which the state courts have treated petitioner's ineffectiveness claim suggests that, at the least, this Court ought to vacate the judgment below and remand for reconsideration in light of *Strickland*. The Virginia Supreme Court denied a petition for appeal on the issue, stating simply in one sentence that there was no reversible error in the judgment of the state circuit court that had considered the merits of petitioner's claim. To the extent it is possible to decipher the circuit court's judgment, however, it seems primarily based on the conclusion that "[i]nstructions given at Petitioner's trial were both adequate and appropriate, and therefore Petitioner's counsel was not ineffective in failing to ask for instructions which Petitioner now claims should have been requested" and the holding that "[a]s a matter of law, no evidence of prejudice has been shown . . . ." App. to Pet. at 7, 6. The former is an impermissible conclusion under *Sandstrom* and indicates that the court simply did not understand the nature of the *Sandstrom* claim. The latter conclusion, to the extent it is in fact a holding of law, also violates *Sandstrom*; to the extent the conclusion instead is an evidentiary one based on review of the record as a whole, the decision should still be vacated and remanded once this Court decides *Francis*, *supra*, and outlines the standard by which the prejudice prong of *Strickland* applies to *Sandstrom* claims.[3]

[2] Pet. for Cert. 3 (citing testimony at plenary hearing on state habeas petition).

In light of the substantiality of petitioner's claim and the shoddy treatment it and our precedents have received in the Virginia courts, I would grant the petition and address the application of *Strickland* to this case.[4] At a minimum, however, the petition should be granted and the judgment below vacated so that the state courts can start this time from the correct premise that a *Sandstrom* error was committed and then begin to consider petitioner's ineffectiveness claim in light of that error and against the backdrop of our decision in *Strickland*.

II

Because I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would in any event grant the stay application and vacate the death sentence. In this particular case, I would also grant the petition to address on the merits the questions of whether petitioner's counsel performed with reasonable competence when he failed to object to a constitutionally defective instruction and

[3] Again, to assure that similarly situated capital defendants are treated similarly, the Court should also consider holding this petition pending decision in *Francis*.

[4] I note also that, if petitioner's counsel cannot be considered ineffective for failing to have raised this objection, it can only be because the claim was not sufficiently apparent at the time of trial that all reasonably competent attorneys would have raised it. In that case, under our decision last Term in *Reed* v. *Ross*, 52 U. S. L. W. 3869 (June 5, 1984), petitioner and his counsel would have had cause for the failure to raise it, and the federal habeas court would then be required to consider whether the failure to give the instruction sufficiently prejudiced petitioner as to require that court to consider the merits of petitioner's challenge. *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). That issue, of course, must be left in the first instance to the federal habeas court.

whether petitioner was sufficiently prejudiced by this failure to warrant a new trial.